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Supreme Court, U.S.
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No. 02-1376

In The

Supreme Court of the United States

BRITTAN COMMUNICATIONS INTERNATIONAL CORPORATION,

Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Fifth Circuit err when it affirmed judgment on the pleadings and held that Section 202 of the Communications Act does not apply to third party billing and collection services, in accordance with the FCC's consistent position on the matter?

PARTIES TO THE PROCEEDING

Respondent Southwestern Bell Telephone Company ("SWBT") has been converted into a Texas limited partnership under the name Southwestern Bell Telephone, L.P. Southwestern Bell Holdings, Inc., a Delaware domestic corporation owns a 99% interest in Southwestern Bell Telephone, L.P. For purposes of this proceeding, we will continue to refer to Respondent as "SWBT." Brittan mistakenly claims that SWBT "is now SBC." (Pet. at ii.) In fact, SWBT is an entirely separate entity from SBC Communications Inc.

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BRIEF IN OPPOSITION

SWBT requests that the Court deny the petition for writ of certiorari in this case. The Fifth Circuit opinion presents no conflict or ruling that would warrant the Court's review.

STATEMENT OF THE CASE

This dispute is not about billing; it is about cramming and SWBT's attempts to protect its end user customers. It was Brittan's bad acts, not SWBT, that eventually drove it out of the long distance resale business. Brittan has never had, nor sought, a billing and collections contract with SWBT. Brittan chose not to enter into a billing and collections contract with SWBT and elected, instead, to submit its charges to a billing aggregator, Billing Concepts, with whom Brittan had a contract. *Brittan Communications Int'l Corp. v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 902 (5th Cir. 2002). Billing Concepts, in turn, aggregated Brittan's charges with those of other long distance providers and submitted them to SWBT for billing. Under the terms of SWBT's billing and collections contract with Billing Concepts, there are no third party beneficiaries and SWBT retained the right to refuse to bill any charges submitted by Billing Concepts which, in the sole opinion of SWBT, might result in complaints to SWBT's business offices. *Id.* at 903. Billing Concepts was never made a party to this suit by Brittan.

Beginning in late 1997 and mounting throughout the first three quarters of 1998, the FCC, various state public utility commissions, and several state attorneys general undertook a variety of independent investigations into end

user complaints, lodged with such authorities, that Brittan was engaged in cramming and/or slamming. (R. at 302-17; 298B-300; 291B; 280B-89.) SWBT also received a large number of end user complaints about Brittan. In response, and after an opportunity to explain or take corrective action was provided, SWBT exercised its contractual rights and notified Billing Concepts that it was suspending its acceptance from Billing Concepts of billing generated by Brittan, until such time as its end user complaint problem was addressed. After Brittan promised Billing Concepts that it would make changes to reduce cramming complaints, and Billing Concepts both agreed to be responsible for Brittan and requested that billing be resumed, SWBT reinstated billing for Billing Concepts of Brittan-generated charges. (R. at 441.)

On December 16, 2002, the Fifth Circuit affirmed judgment in favor of SWBT on Brittan's Section 202 claim, as well as Brittan's claims of fraud and deceptive trade practices. *Brittan Communications*, 313 F.3d at 899.

In its petition, Brittan only challenges the Fifth Circuit's ruling on its Section 202 claim.

SUMMARY OF THE ARGUMENT

Brittan's reasons for review are not "compelling" as required by Sup. Ct. R. 10. The issue of law at the crux of Brittan's arguments – whether the Fifth Circuit properly adopted the FCC's position regarding the scope of Section 202 of the Communications Act – does not satisfy any of the compelling considerations that support review. The Fifth Circuit's holding does not conflict with the decision of another court of appeals on the same matter or any court

of record; and it has not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). It also does not rise to the level of "an important question of federal law that has not been, but should be, settled by this Court" and certainly does not conflict in any way with any prior decision of the Court. Sup. Ct. R. 10(c).

Indeed, the Fifth Circuit's ruling is consistent with other courts' decisions regarding the scope of Section 202. The Fifth Circuit's holding is also consistent with the FCC's unswerving position since 1986, which is a reasonable interpretation of the statute.

STATEMENT OF FACTS

A. The Parties.

Petitioner Brittan was a small, switchless reseller of long distance telephone service. (R. at 107.) According to the most recent data available, there are 5,679 interstate service providers, which include toll resellers like Brittan, as well as facilities-based carriers. *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003*, MD Docket No. 03-83, FCC 03-64, 2003 WL 1525987 at Attachment A, ¶ 9 (F.C.C. March 26, 2003). Brittan had no telecommunications facilities of its own, but rather leased long distance access from two existing long distance carriers and resold this access to end user customers in 42 states. (R. at 107 & n.1.) SWBT provides local exchange services and is only licensed to provide local exchange services in five states. SWBT does not provide interstate or foreign communications for hire and is not even the

only local exchange carrier in those five states. (R. at 106-7.) Some of Brittan's long distance customers were also local telephone or "local exchange" customers of SWBT in the five states in which it is licensed to provide local exchange service. It is only with regard to the bill for existing SWBT local exchange customers that SWBT can add the charges of unrelated long distance and information service providers.

Although Brittan could have entered into a billing and collection services contract with SWBT, Brittan made a business decision not to do so. Brittan chose instead to contract with a billing aggregator, Billing Concepts, for the provision of billing and collection services. (R. at 106; 420-21; 376B[1].) Billing Concepts is not and never has been a party to this action. Billing Concepts has billing and collection contracts with various entities, including one with SWBT. (R. at 377B.)

Under the terms of its billing contract with SWBT, Billing Concepts aggregated Brittan's charges with those of many other service providers and forwarded them to SWBT for collection. SWBT had the contractual right to suspend, at any time and even without notice, the billing of any of those charges which, "in SWBT's sole opinion, may result in nuisance calls to SWBT." (R. at 451-451B; 452-453B.) SWBT placed the charges received from Billing Concepts on the telephone bills of SWBT's end user customers, collected the payments due, and forwarded those

[1] In certain instances, the record was not numbered consecutively or in the same order that the documents were filed, and some of the record cites are from the backside of a copied page. Cites to the reverse side of numbered pages in the record are noted herein as "R. at __B."

payments back to Billing Concepts. (R. at 106.) Billing Concepts performed these billing aggregating services for over 400 sub-CICs (customers of billing aggregators) in 1998. (R. at 421.)

B. Brittan's problems with authorities and regulatory agencies.

In 1997 and 1998, a multitude of federal and state authorities and regulatory agencies became concerned about Brittan's marketing practices as a result of consumer complaints. (R. at 302-17; 298B-300; 291B-296; 280B-89.) A number of these entities fined Brittan, imposed restrictions on its operations, and/or completely barred Brittan from doing business in their jurisdictions:

- In April 1997, the California Public Utilities Commission investigated allegations that Brittan switched end user customers' long distance carriers without authority. After several hearings, Brittan was ordered to pay $702,480 in restitution to at least 35,007 customers and agreed that it would not operate in California for at least two years. (R. at 302-17.)

- On October 22, 1997, Brittan entered into an Assurance of Voluntary Compliance with the Texas Attorney General and agreed to change its sweepstakes forms to clarify that a person could enter the sweepstakes without changing his or her long distance services to Brittan. (R. at 298B-300.) Brittan also paid a fine of $65,000. (*Id.*)

- On January 5, 1998, Brittan entered into an Agreed Order with the State of Arizona

concerning its sweepstakes forms and agreed to make marketing changes, including changes to assure that its promotions and advertisements contained information in both English and Spanish, and wording its promotions to clearly and conspicuously state that consumers did not have to change their long distance service to win. Brittan also agreed to pay a $95,000 fine. (R. at 291B-296.)

- On October 29, 1998, the FCC initiated an enforcement action against Brittan, and issued a Notice of Apparent Liability, outlining its proposed fine against Brittan in the amount of $1,120,000. The FCC explained that the size of the fine was based on the egregious nature of the facts, namely that the FCC determined that, as to end user customers who lodged a formal complaint with the FCC, at least twelve of the Brittan Letters of Authority ("LOAs") were forged. (R. at 280B-289.) Ultimately, the FCC fined Brittan one million dollars. (R. at 440.)

Additionally, Brittan was in trouble with authorities in a number of states, including Mississippi, Florida, Michigan, and Georgia for slamming and/or cramming. (R. at 378B-79B; 272-76; 269.)

C. Brittan's problems with other local exchange carriers.

SWBT was not the only local exchange carrier to voice concerns to Billing Concepts about the charges and end user complaints generated by Brittan. In May 1998, Bell Atlantic advised Billing Concepts that it had suspended billing for Billing Concepts of Brittan-generated charges

due to excessive end user complaints. (R. at 245-47; 419.) Bell Atlantic only resumed billing of these charges after Billing Concepts assured Bell Atlantic that Brittan had agreed to cease billing monthly recurring charges for those months when end users had no charges accompanied by associated toll. (R. at 419.)

In September 1998, Ameritech, another local exchange carrier (unaffiliated with SWBT at that time), complained to Billing Concepts about the high level of complaints associated with Brittan-generated charges. (R. at 243.) Ameritech advised Billing Concepts that the complaint levels for its August billing of Brittan-generated charges exceeded Ameritech's thresholds and that if Ameritech received two more batches of complaints against Brittan, under Ameritech's "three strikes and you're out" policy, Ameritech would suspend its billing and collection for Brittan-generated charges from Billing Concepts. The billing of such charges continued to result in high levels of end user complaints, and by early October of 1998, Billing Concepts and Brittan knew that suspension of billing these charges for Billing Concepts by Ameritech was imminent. (R. at 383B-84B.)

D. SWBT and Ameritech independently and temporarily suspend billing for Billing Concepts of Brittan-generated charges.

In the fall of 1998, SWBT took random samples, of fifty to one hundred complaints, for each of those billing and collection customers whose billing was generating the highest numbers of complaints. SWBT received approximately 2400 end user complaints associated with charges that Billing Concepts had tendered to SWBT for billing. (R. at 233-36.) In late October, SWBT pulled a random

sample of one hundred of the twenty-four hundred complaints from September 1998 involving charges submitted by Billing Concepts for billing. (R. at 227; 229.) Thirty-four of the one hundred complaints sampled, more than those lodged against any other single sub-CIC of Billing Concepts, were against Brittan. (*Id.*) The survey showed that none of the end users who complained had selected Brittan as their long distance carrier, and in many cases, these end users claimed they did not even know who Brittan was. (R. at 227; 622 ("never ordered," "did not authorize," "claims no knowledge").) Two other sub-CICs of Billing Concepts, Quintelco and Telco Partners, had thirty-two and eighteen of these one hundred sampled complaints respectively. Because prior warnings had been issued concerning complaints associated with these sub-CICs, SWBT immediately suspended its acceptance from Billing Concepts of charges generated by Quintelco and Telco Partners. (R. at 227.)

In response to the survey, SWBT informed Billing Concepts of SWBT's intention to suspend also its acceptance from Billing Concepts of any Brittan-generated charges unless Billing Concepts could provide SWBT within five days of "any reasons you may find which would keep us from taking the same action [as SWBT had taken already with regard to charges generated by Quintelco and Telco Partners]." (R. at 227.) In response, Brittan sent Billing Concepts a letter, which merely blamed the two long distance carriers whose services Brittan was reselling, for the specific complaints in the sample. The letter did not provide any assurances that the problems had been resolved or that further complaints would not be lodged if billing continued. (R. at 224-25B.)

SWBT therefore informed Billing Concepts that SWBT would suspend its acceptance of billing from Billing Concepts of Brittan-generated charges, unless and until Billing Concepts provided SWBT with a specific action plan designed to reduce complaints. (*Id.*) Shortly thereafter, SWBT determined it would place the decision, whether the suspension should be lifted, in the hands of Billing Concepts, and so advised Billing Concepts. (R. 392.)

In a telephone conference call on November 16, 1998, SWBT reminded both the Billing Concepts and Brittan participants that SWBT had previously announced that it had turned the decision, whether to reinstate billing of Brittan-generated charges, over to Billing Concepts. The Billing Concepts representatives on the call acknowledged this fact, informed the parties that it was a decision for Jackie Mitchell, the president of Billing Concepts, to make, and advised the participants that Ms. Mitchell was out of town. (R. at 389, 392; 409-10; 413-14; 763.)

Brittan later committed to Billing Concepts that it would make various changes to reduce complaints. (R. at 409-10; 175-214.) In response, Billing Concepts informed SWBT that Brittan should be reinstated on SWBT's billing tables. (R. at 172.) Thereafter, in the course of business, SWBT resumed billing for Billing Concepts of Brittan-generated charges, SWBT processed all of the Brittan-generated billing tendered by Billing Concepts, and the money collected was paid to Billing Concepts. (R. at 441, 445.)

ARGUMENT

A. The Fifth Circuit's Well-Reasoned Opinion is Based On the FCC's Consistent Position On Billing and Collection Services.

The FCC has spoken on the scope of Section 202, and it has consistently determined that Section 202 does not apply to billing and collection services that Local Exchange Carriers ("LECs") provide to other parties. According to the FCC, such billing and collections services do not satisfy the two requirements for activity to be regulated by Title II.[2] To determine whether certain activity is covered by Section 202 or not, the FCC inquires into two basic areas: (1) whether the activity in question constitutes "wire communication" within the meaning of Section 3(a) of the Communications Act, 47 U.S.C. § 153(a); and (2) whether the activity is provided on a carrier basis within the meaning of Section 3(h) of the Communications Act, 47 U.S.C. § 153(h). *In the Matter of Detariffing of Billing & Collection Services*, 102 F.C.C.2d 1150 (1986); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 8 F.C.C.R. 4478 ¶ 12 (1993); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (reviewing the two-part test for deciding whether a carrier is engaged in common carriage and remanding for FCC to determine whether petitioners had offered dark fiber service on a common carrier basis).

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[2] Neither the district court nor the Fifth Circuit had to reach the merits of the discrimination claim, but they both could have rendered summary judgment on Brittan's Section 202 claim in any event because there is absolutely no evidence of disparate treatment. (R. 480-84.)

An entity may be considered a common carrier for some practices, and a private carrier for others. *Southwestern Tel. Co.*, 19 F.3d at 1480-81; *In the Matter of Audio Communications, Inc. Pet. for a Declaratory Ruling that the 900 Serv. Guidelines of US Sprint Communications Co. Violate Sections 201(A) & 202(A) of the Communications Act*, 8 F.C.C.R. 8697, ¶¶ 12-22 (1993). If the carrier chooses its clients on an individual basis and "there is no specific regulatory compulsion to serve all indifferently," the entity is a private carrier for that type of service, and the FCC may not subject the entity to regulation as a common carrier. *Southwestern Bell Tel. Co.*, 19 F.3d at 1481. SWBT provided its billing and collection services on an individual basis. There is absolutely no evidence, and certainly no support in the record, for Brittan's claim that SWBT's provision of billing and collection services were offered as "common carrier services" within the special meaning attributed to that phrase by the Communications Act.

As the Fifth Circuit correctly recognized, the FCC has never altered its view that billing and collection services provided by LECs to unaffiliated long-distance providers is outside the scope of Title II, 47 U.S.C. §§ 201-224. *Brittan Communications*, 313 F.3d at 905-06, *citing In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 24,744, ¶ 70 & n.87 (1998).[3] Brittan claims that the FCC has been inconsistent and/or arbitrary. The Fifth Circuit correctly concluded, however, that the FCC's position is, and has been, consistent and reasonable.

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[3] In contrast, a carrier's own billing and collection services for itself may be considered common carrier services under Title II. *Id.*

1. The FCC's consistent position has excluded billing and collection services from regulation under Title II.

The FCC has never retreated from its consistent position that billing and collection services provided by LECs to long distance providers is outside the scope of Title II. In 1986, the FCC first addressed this issue head on and concluded that billing and collection services for another entity are not subject to Title II. *In the Matter of Detariffing of Billing and Collection Services*, 102 F.C.C.2d 1150, ¶¶ 30-33 (1986). Three years later, the FCC determined that it had preemptive jurisdiction over billing and collection services, and its preemptive jurisdiction precluded state agencies from imposing regulations on the rates for such services. The FCC then reiterated that billing and collection services are not subject to Title II regulation. *In the Matter of the Pub. Serv. Comm'n of Maryland and Maryland People's Counsel Application for Review of a Memorandum Opinion and Order By the Chief*, 4 F.C.C.R. 4000, ¶¶ 40-43 at n.76 (1989).

In 1992, the FCC considered the regulation of validation and screening services, which are separate and distinct from billing and collection services, and concluded that "[b]illing and collection of course, remains outside the scope of Title II because it is not a common carrier service." *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 F.C.C.R. 3528, ¶ 26 & n.50 (1992).

Similarly, in 1993, the FCC required LECs to provide billing names and addresses ("BNA") under certain circumstances, but still noted specifically that "[i]n concluding that the provision of BNA is now properly subject to

Title II regulation, we emphasize that we do not disturb our prior finding that the provision of interstate billing and collection services by a LEC to an unaffiliated IXC [interexchange carrier] is not a common carrier service under Title II." *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 8 F.C.C.R. 4478, ¶¶ 20, 42 & n.61 (1993)

Five years later, in *In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 24,744, ¶ 70 (1998), the FCC mentioned billing and collection services in their discussion of universal service fund fees. In addressing a carrier's own responsibilities to describe charges on its own bills accurately, the FCC stated that "a carrier's billing and collection practices for communications services are subject to regulation as common carrier services under Title II of the Act." *Id.* This statement was clearly limited and referred only to a carriers' own description of charges on its own bills, not billing by LECs for other parties. At that time, the FCC was especially concerned with how carriers classified charges on bills for universal fund charges and prohibited the carriers from describing these charges as mandatory or federally-approved. In footnote 87 of its ruling, the FCC specifically noted that carrier remains liable for truthful billing even if billing and collection is done by another entity.

In 1999, the FCC again specifically noted that billing and collection services are excluded from coverage under Title II. *In the Matter of Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, 14 F.C.C.R. 10,861, ¶¶ 59-60 (1999) ("In 1992, the Commission clarified that billing and collection service was a communications service within the meaning of Section 3(a) of the Act,

but that it was not subject to regulation under Title II because it was not a 'common carrier' service.").

Likewise, in *In the Matter of Truth in Billing Format*, 14 F.C.C.R. 7492, ¶ 25 (1999), the FCC considered various protections for consumers, including guidelines of carrier billing. The FCC explicitly confirmed that these consumer protection guidelines applied to the carrier providing service to end users, but not to those carriers' billing agents. *Id.*

In *In the Matter of Teleservices Industry Association v. AT&T*, 15 F.C.C.R. 21,454 (2000), the FCC again explicitly stated that "billing services are not subject to tariff regulation under Title II of the Act and are currently unregulated." *Id.* at ¶ 2 & n.5.

The FCC has never strayed from its position that billing and collection services for a third party are not regulated by Title II. Surprisingly, Brittan failed to mention in its petition that the other courts who have confronted this issue have determined uniformly that billing and collection services are not subject to Title II. The Second Circuit expressly adopted a finding on this same point in *International Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 893 F. Supp. 1207, 1224 (S.D.N.Y. 1994), *aff'd*, 62 F.3d 69 (2d Cir. 1995). Additionally, the District of Columbia Circuit rejected a petition asking for regulation of billing and collection services and found that the FCC's refusal to regulate billing and collection services was neither arbitrary nor capricious. *Capital Network Sys. v. FCC*, 3 F.3d 1526 (D.C. Cir. 1993).

Brittan points to *Golden Belt Telephone Association v. C.I.R.*, 108 T.C. 498 (1997), claiming that it proves that the FCC's position is arbitrary. In *Golden Belt*, the Tax Court

was trying to determine whether the billing services that Golden Belt provided in conjunction with its local and long distance services was separate income that should be taxed or whether it was tax-exempt as an element of the communication services that Golden Belt provided. The Tax Court relied on the FCC's prior statements about whether billing and collection services are communication services to determine the interpretation of a tax statute. The Tax Court quoted from the FCC's 1992 decision from *In the Matter of Policies and Rule Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards* and concluded that these services were communication services, but "[b]illing and collection, of course, remains outside the scope of Title II because it is not a common carrier service." *Id.* at 504.

Brittan simply has no authority to support its contention that billing and collection services by LECs for other entities are subject to regulation under § 202 of the Communications Act.

2. The FCC's position and the Fifth Circuit's ruling are a reasonable interpretation of Section 202.

Brittan claims, without any cite to authority, that LECs provide billing and collection services in their capacity as common carriers. (Pet. at 17.) Even under the plain terms of the statute, this conclusion is obviously flawed. There is absolutely no evidence, and certainly no support in the record, for Brittan's claim that SWBT provides billing and collection services on a "common carrier" basis within the special meaning attributed to that phrase by the Communications Act.

Even a cursory examination of the statutory language defies such a claim. Section 202 prohibits discrimination by "any common carrier . . . for or in connection with like communication service. . . . " It is based on this language that the FCC's analysis involves two basic questions: whether a communications service is involved and whether it is provided on a common carrier basis. The literal language of the statute does not compel the conclusion that it includes billing and collection services because such services are not literally communication services and LECs' billing and collection services certainly do not fit the common understanding of the term "common carrier communication services."

Brittan claims that the FCC has acknowledged that billing and collection services are subject to common carrier requirements. (Pet. at 18.) The FCC has not acknowledged that billing and collection services for third parties, which are not tied to access, are subject to common carrier requirements. In support of this contention, Brittan points to 47 U.S.C. § 272 of the 1996 Telecommunications Act and asserts that it involves common carrier requirements, and that it has been extended to cover billing and collection services. (Pet. at 18.) The nondiscrimination provisions of § 272 specifically encompass a wide variety of services, far more extensive than the "common carrier communications services" addressed in § 202. The fact that the FCC has determined that such services are subject to nondiscrimination does not support Brittan's claim that billing and collection services are subject to the common carrier requirements of Title II. Section 272 does not mention common carrier communications services. Rather, § 272(c)(1) broadly states that a Bell Operating Company:

> may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards.

If Brittan's distorted conclusion were correct, § 272 would just be cumulative of the provisions of § 202.[4]

Brittan cites one case purportedly in support of its statutory construction argument, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). This case is inapposite. In *Association of Communications Enterprises*, the Court of Appeals for the District of Columbia concluded that the FCC was unreasonable in its statutory construction of the term "successor or assign." The FCC argued that an advanced services affiliate was not encompassed by the term "successor or assign." Obviously, the terms at issue are not the same in this case, and the FCC's interpretation of other terms in an entirely different context is not helpful to determine whether the FCC's interpretation in this case is appropriate.

If the statute is considered ambiguous, the FCC's interpretation of the statute is entitled to deference as long as it is a reasonable interpretation. *Verizon Communications Inc. v. FCC,* 535 U.S. 467, 502, 122 S.Ct. 1646, 1668 (2002); *National Cable & Telecommunications Association, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333, 122 S.Ct.

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[4] Brittan could not have brought a claim under § 272, however, because until July 2000, SWBT did not have any affiliates who provided InterLATA services. (R. 480.) Therefore, § 272 did not apply in November 1998, when Brittan's billing was suspended. But because § 272 applies now, Brittan's assertion that review is necessary in this case to avoid discrimination (Pet. at 24) misses the mark.

782, 786 (2002). The FCC's interpretation of § 202 is reasonable. It should not be disturbed.

3. Brittan's analogies to other services do not compel any change on the FCC's position with respect to billing and collection services for third parties.

Brittan claims that the FCC has imposed regulations on LECs who provided billing and collection services in connection with their payphone services, and that this requires billing and collection services to be regulated under Title II. The FCC has decided that if LECs provide basic, tariffed payphone services that will only function in conjunction with billing and collection services from LECs, LECs are required to provide billing and collection services, too. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 F.C.C.R. 20,541, ¶ 149 (1996). A requirement to provide billing and collection services under those circumstances is very different from providing billing and collection services to a third party when they are not tied to, or a prerequisite for, accessing the service.

Brittan asks the Court to believe that the FCC meant to regulate billing and collection services by LECs when it imposed certain standards and limitations on how carriers bill and collect for their own interstate offerings. Brittan's arguments on this point are circular, conclusory, and flat-out wrong. As the Fifth Circuit found, the FCC did not proclaim in any way that it would regulate billing and collections by LECs for third parties, even though it made clear that carriers are obligated to provide truthful billing to their customers with regard to the charges they

generate. *In the Matter of Truth in Billing Format*, 14 F.C.C.R. 7492, ¶ 25 (1999).

B. Brittan Has Not Raised Any Issue Worthy of Further Review by this Court.

Brittan has not raised any "compelling" reason for review. Sup. Ct. R. 10. The Fifth Circuit's holding does not conflict with the decision of another court of appeals on the same matter, and in fact, it does not conflict with the decision of any court of record. The Fifth Circuit's decision in this case has not "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). It also does not rise to the level of "an important question of federal law that has not been, but should be, settled by this Court," and certainly does not conflict in any way with any prior decision of the Court. Sup. Ct. R. 10(c).

As demonstrated above, the Fifth Circuit simply adopted the FCC's consistent position for the past seventeen years, which has specifically excluded billing and collection services for third parties from Title II. The courts that have addressed this issue have uniformly agreed. There is no need for the Court to review this issue any further.

CONCLUSION

In short, Brittan has not demonstrated at all that the FCC has acted arbitrarily or unreasonably in excluding billing and collection services from Title II regulation. Significantly, there are no conflicts here between or among

the courts or between the courts and the FCC. SWBT respectfully submits that the Fifth Circuit properly decided this case and requests that the Court deny the petition.

Respectfully submitted,

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